No. 225

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

THE UNITED STATES,
Plaintiffs in Error,

vs.

JOHN M. McDONALD,
Defendant in Error.

PETITION FOR REHEARING ON BEHALF OF DEFENDANT IN ERROR.

RUSSELL J. WILSON,
Solicitor for Defendant in Error.

Raveley Printing Company, 518 Clay St., S. F.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF MONTANA.

THE UNITED STATES, *Plaintiffs in Error,* *vs.* JOHN M. McDONALD, *Defendant in Error.*	No. 225.

PETITION FOR REHEARING ON BEHALF OF DEFENDANT IN ERROR.

To the Honorable Judges of the United States Circuit Court of Appeals, for the Ninth Circuit.

It is with much reluctance and the greatest respect that we appear before this Honorable Court with a petition for a rehearing in this case; but we believe a great injury has been done by the arbitrary and technical act of a comptroller in the employ of the United States, and

great and irreparable loss will be suffered by the defendant in error herein unless this Court shall change its former decision.

Mr. McDonald did not solicit an appointment but was sought for by the United States to relieve its embarrassment, and in view of these circumstances and for the reasons hereinafter set forth, the defendant in error earnestly but respectfully petitions for a rehearing of this cause under Rule 29 of this Honorable Court.

The prevailing opinion seems to turn upon the points whether Mr. McDonald *performed any services for the United States*, and whether this action could be maintained by him against the Government, but with all deference it is respectfully suggested that sufficient importance has not been given to the fact that Mr. McDonald was appointed *by direct authority of the Attorney-General of the United States*, and although technically only a clerk, he was appointed to and did perform services as an attorney at law, and his services as such were rendered for and accepted by the United States, and a contract was thereby made between him and the Government which by accepting and continuing to accept the services of Mr. McDonald agreed, impliedly at least, to pay for the same; and it is also respectfully suggested that the *confessions of the answer* have perhaps not been given the full weight they merit.

In the answer the United States admit the allegations of the bill, and the Honorable Hiram Knowles, United States District Judge for the District of Montana, in commenting upon the bill and answer, says: "There

would not appear, considering the ordinary rules of pleading, that there was any issue of fact to be tried upon the issue here presented."

On January 26th, 1891, the District Attorney of Montana wrote the Attorney-General of the United States complaining that the business of the United States was increasing so fast as to be beyond any power to give it proper attention and asking authority to appoint Mr. McDonald, the defendant in error herein, his assistant, his compensation to be allowed from the emoluments of the office, and in reply the Attorney-General wrote that it was a difficult matter to get a settlement from the accounting officers of the Treasury when an *assistant attorney* was appointed at a compensation to be allowed from the emoluments, and in lieu suggests that *the better way* would be to appoint a person *for the discharge of clerical services* at a salary not to exceed $1500, *such person to be an attorney-at-law who could assist in the courts.* (Trans. pp. 33 and 34.) Why was this suggestion made and why was it "the better way?" Was not *the better way* the one by which there would be no difficulty in getting a settlement from the accounting officers—that is, to appoint another *clerk* in the office of the District Attorney who, however, should have the qualifications necessary to relieve the pressure in the office? The Attorney-General then added, in his letter, that the appointee was to understand that he could have no account against the United States, but was to look exclusively to the District Attorney for compensation. Mr. McDonald was thereupon appointed for the *discharge of clerical services* but it

certainly was the expectation of the Attorney-General and of the District Attorney that the person so appointed was to perform legal as well as clerical services and was to be paid from the emoluments of the latter's office.

The letter of the Attorney-General at best seems to be quite ambiguous, but we respectfully contend that a contract was made between the United States and Mr. McDonald by this letter and the subsequent appointment by the District Attorney.

The meaning of the concluding sentence of the Attorney-General's letter is perhaps susceptible of doubt, but we contend that it is either mere surplusage, for had the concluding sentence been omitted entirely Mr. McDonald could only have looked to the fees and emoluments of the office for his compensation; or, *secondly*, it is a statement written from excess of caution, of what the District Attorney already knew, that the appointee must not look to draw his compensation from the Treasury of the United States, but only to the District Attorney—that is, from the emoluments of his office; or, *thirdly*, it means that if the District Attorney is unwilling to take the suggestion made to appoint a clerk instead of an assistant attorney then permission is not withheld from him to appoint such assistant attorney, providing he can have no account against the Government for his services as such assistant attorney. Mr. McDonald, however, was *not* appointed an assistant attorney, but was appointed a clerk under the suggestion and authority of the Attorney-General, and his cause of action is founded on his services as clerk,

which clerical services are *admitted by the answer* of the Government to have been performed.

No matter which of the three interpretations be adopted as correct, we submit, with great deference, that the position of the defendant in error is equally strong.

If the Government was not a party to the contract, why should the appointee's qualifications be specified and the salary fixed by the Attorney-General, and why should he say that the salary must be paid from the emoluments of the District Attorney's office which were under the Government's sole control ?

The District Attorney was not expected to deduct Mr. McDonald's compensation from his own allowed salary of $6000; and if McDonald could have no account against the District Attorney or against the United States, his compensation could only be paid *from the emoluments* of the office in which he was employed. He certainly had a contract with and a claim against *somebody*, and as he could not sue the District Attorney, who in no event could be responsible to him, then of necessity this condition that he was to have no account as against the United States meant *only in the first instance*, for circumstances might and subsequently did arise which would give him a claim against the Government. He was in the first instance to look exclusively to the District Attorney for his compensation—that is, to the fees and emoluments of that office—but the Government through its Comptroller, *refusing* to permit him to be paid from the emoluments and *retaining and keeping* in its treasury these emoluments which were more than sufficient to pay

the compensation authorized by the Attorney-General, what recourse had McDonald except to sue the United States, he being the real party in interest and the United States being the custodian of his funds so wrongfully kept from him?

Mr. McDonald *in good faith* performed the required services and thus relieved the pressure in the District Attorney's office complained of in the latter's letter of January 26th, 1891, to the Attorney-General of the United States, and there certainly was a privity between him and the Government. The amount of his salary, as fixed by the Attorney-General of the United States, was included by the District Attorney in his return with the request that the said salary be allowed from the emoluments of his office, but the same was disallowed by the Comptroller, and *only because Mr. McDonald was styled in the return of the District Attorney as "Assistant Attorney," instead of "Clerk."* The Comptroller made no complaint except this single one that he was incorrectly named, and would have allowed his salary but for this error, which was entirely natural for the reason that Mr. McDonald, although appointed as a clerk, was expected to and did act as attorney for the Government in court, and it would have been strange indeed if the Government's legal representative in court when arguing a cause had been styled a "clerk" instead of "assistant to the District Attorney."

It is respectfully contended that it should not be overlooked that in the pleadings—Bill and Answer—there is no mention of any services by Mr. McDonald except *as*

clerk, and that the objection of the comptroller was only a technical one in that he was styled "assistant attorney" instead of "clerk."

This inconsequential error in the return was corrected, however, by the District Attorney, who wrote the Comptroller as follows: "He is a *clerk* in my office, appointed by me under directions of the Attorney-General, at a salary of $125 per month, to be paid out of the emoluments of this office." Notwithstanding this plain correction the Comptroller wrote back requiring a "sworn statement" that Mr. McDonald performed *clerical services only and did not act as an attorney or perform legal services.* Mr. McDonald was appointed *for the very purpose of doing legal work* (see Attorney-General's letter) and, of course, could not furnish the affidavit thus *arbitrarily* required. But why should that have caused the Comptroller to refuse to allow his salary? He was *technically* appointed to and did perform *clerical services* but was actually expected to and did also *act as an attorney.* Had he not been an attorney he would never have been appointed to the clerical position. The Government did not require another *clerk* in the office of the District Attorney in order to properly protect its increasing business, but it did need an *attorney* to assist the District Attorney in his professional work; and because Mr. McDonald was able to assist the District Attorney in Court and to perform the very services for which there was such great necessity, thus assisting "the United States whose business was increasing so fast as to be beyond any power to give it proper attention," the Comptroller by a very

technical and highly arbitrary action deprives him of his just compensation for able services rendered to and accepted by the Government and its officers in time of need.

We respectfully urge that the cases cited in the prevailing opinion are inapplicable to the case at bar and are all distinguishable from it.

Mr. McDonald was not an ordinary clerk but was especially appointed by the Attorney-General of the United States in a time of emergency and without doubt there was a privity between him and the Government. In this behalf, we beg leave to invite the attention of the Court to the decision in the case of U. S. vs. MacDaniel, 7 Pet., 1, where the Supreme Court said:

"It is insisted that as there was no law which authorized the appointment of the defendant his services can constitute no legal claim for compensation, though it might authorize the equitable interposition of the Legislature. That usage, without law or against law, can never lay the foundation of a legal claim, and none other can be set off against a demand by the Government. A practical knowledge of the action of every one of the great departments of the Government must convince every person that the head of a department in the distribution of its duties and responsibilities is often compelled to exercise this discretion. He is limited in the exercise of its powers of the law; but it does not follow that he must show a statutory provision for everything he does; no government could be administered on such principles."

After quoting the above the learned judge in the court below said:

"It is evident from the views expressed throughout this decision that the Attorney-General had the right to authorize District Attorney Weed to employ plaintiff as a clerk, and that he having done so under such authority, plaintiff is entitled to the compensation provided in the employment."

Can it be said that such an appointee of such a high officer as Attorney-General of the United States is in no sense an employee of the United States? Is the power of the Attorney-General to be so limited that he cannot make an appointment at even such a small salary in order to perhaps save the Government thousands of dollars?

The suggestion of the Attorney-General that a person be appointed "for the discharge of clerical services at a compensation not exceeding $1500, such person to be an attorney-at-law who can assist in the courts," was made in order that there might be no difficulty in his securing his compensation, but it was an unfortunate suggestion for Mr. McDonald and has had a diametrically opposite effect to that intended.

Because Mr. McDonald was able to perform *double* services, both as clerk and as attorney, shall he for that reason receive no pay whatever? There was no complaint that he did not faithfully perform all services required of him as clerk—on the contrary, it is affirmatively set up in the petition and *admitted by the answer* that he did perform such clerical services.

The Comptroller was informed by the District Attorney that McDonald was only a clerk in his office and yet he

refused to allow his salary. What was McDonald's remedy? He could not sue the District Attorney nor could he compel the District Attorney to sue the Government for his benefit. In fact the District Attorney would probably not have brought the action if so requested, as it would have entailed upon him great trouble and considerable expense. McDonald was the real party in interest and had a claim against the fees and emoluments which under the law had been turned over to the Treasury, after the District Attorney had deducted his own salary and all other amounts allowed by the Comptroller. In the emoluments and fees turned over to the Treasury as not allowed by the Comptroller was Mr. McDonald's salary and the question was, how was he to get his salary fixed by the Attorney-General?

Had the fees and emoluments turned over to the Treasury amounted to only $100 in excess of the allowances, he certainly could have had no claim on the Government beyond the $100, but the fees and emoluments were largely in excess of the amount of his salary and he should have been paid from them. The District Attorney under the law could only retain of these fees and emoluments such amounts as were allowed by the Comptroller and the rest went into the Treasury of the United States. The Comptroller refusing to allow Mr. McDonald's salary, arbitrarily or otherwise, how could he obtain justice except by a suit brought against the only party who owed the money and who alone had possession and control of the fund from which his salary should have been paid?

We earnestly but respectfully submit that under all the circumstances Mr. McDonald was an employe of the Government, but even if the contrary should be the opinion of the Court, nevertheless there was an implied contract between Mr. McDonald and the United States, and that he was authorized to bring the present suit under the Act to provide for the bringing of suits against the Government, Sup. to Rev. Stats., p. 559, as said by his Honor Judge Gilbert in the dissenting opinion. This Act authorizing suits against the Government where there is a contract, express or implied, with the Government, is also cited by his Honor Judge Knowles in the opinion in the court below as the statute authorizing the present suit.

We request the attention of the Court to the decision in the case of *Coleman* vs. *United States*, 152 U. S., 99. The Court there uses the following language: "The appellants contend that the facts disclosed in their petition constitute an implied contract on the part of the United States to pay the value of the services rendered and of the expenditures made in furtherance of a suit in which they were beneficially interested. Assuredly there may be a state of facts from which an implied contract or promise to pay for services rendered may be justly inferred and we do not doubt that, in such a case, where the United States are parties defendant, the Court of Claims have jurisdiction. * * * But we think that a promise to pay for services can only be implied when the Court can see that they were rendered in such circumstances as

authorized the party performing to entertain a reasonable expectation of their payment by the party benefited."

There certainly was a contract, express or implied, to which Mr. McDonald was *one* of the parties.

The *other* party must have been either the District Attorney or the United States. We think we have shown that the United States is this other party; but if it be the opinion of the Court that the District Attorney was the other party to the contract with McDonald, then as the District Attorney was deprived of the right to pay McDonald by the United States and could not sue the United States for McDonald's benefit by reason of being out of office before the final disallowance of McDonald's claim, McDonald was most assuredly relegated to all of the District Attorney's rights to sue the Government for his own benefit.

The petitioner was employed under the direct authority of the judiciary department of the Government, his compensation fixed by the Attorney-General of the United States, and not by the District Attorney, and his salary was to be paid out of the fees and emoluments of the District Attorney's office which moneys belonged to the United States and not to the District Attorney.

Such being the case, was there not a contract between McDonald and the only party who owned and had exclusive control of the fund from which he was to be paid, and who fixed the amount of his salary through its Attorney-General?

His services were rendered exclusively for and accepted by the United States.

The District Attorney could not pay McDonald except from the emoluments of his office and this he was prohibited from doing by the arbitrary act of the Comptroller.

There are strong equities in the case at bar which is surely within the purview of the Act already referred to as authorizing suits such as the present against the Government.

For the sake of argument let us suppose that McDonald was only a clerk and not an attorney and had been appointed under a similar authority from the Attorney-General because there was need of another clerk, then unquestionably his salary would have been payable from the emoluments of the office, and yet, nevertheless, the Comptroller might *arbitrarily* disallow his salary, and if the District Attorney should refuse to bring suit for the benefit of his clerk, what remedy would he have?

Is there no remedy against such an arbitrary act of the Comptroller? Unless this decision be modified, we respectfully insist that the Comptroller will be elevated to the position of an absolute despot in such matters and there can never be any recovery by a clerk whose salary is wrongfully withheld from him.

Or, suppose the District Attorney were willing to bring the suit but his term of office had expired before the final disallowance of his clerk's salary, and the Comptroller still arbitrarily refusing to allow the same, should the Government be allowed to take advantage of such a technicality to deprive its servant of just compensation for services in good faith honestly performed? We do

not believe that any such power rests with the Comptroller to thus arbitrarily deprive the appointees of the Attorney-General of their none too liberal compensation.

And yet Mr. McDonald will be absolutely without remedy if the decision of this Honorable Court be not changed. A great wrong has been done him by the highly arbitrary and technical stand of the Comptroller, and it would seem as if the maxim that "there can be no wrong without a remedy," would fail in this instance.

It is another old maxim of the law that "no one shall take advantage of his own wrong," and yet in this case the Government is taking advantage of the wrongful act of its Comptroller. We believe this expression is not too strong under all the circumstances and especially in view of the arbitrary and impossible requirement of the Comptroller that a sworn statement be furnished when he well knew that Mr. McDonald was obliged to perform those very services for the Government which he was required to swear he did not perform before he could have his salary allowed.

We beg leave to refer to the opinion of the Hon. Hiram Knowles, set forth in the Transcript.

We believe the strong equities in this case entitle it to a careful reconsideration by this Honorable Court and respectfully refer to the opinion rendered by his Hon. Judge Gilbert, and submit that the same should be the prevailing opinion in the case.

For the foregoing reasons a rehearing is respectfully asked.

RUSSELL J. WILSON,

Solicitor for Defendant in Error.

Dated San Francisco, March 10th, 1896.

STATE OF CALIFORNIA, }
City and County of San Francisco. } *ss.*

I, Russell J. Wilson, Solicitor for Defendant in Error, do hereby certify that in my judgment the foregoing Petition for Rehearing is well founded, and that it is not interposed for delay.

RUSSELL J. WILSON.